United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

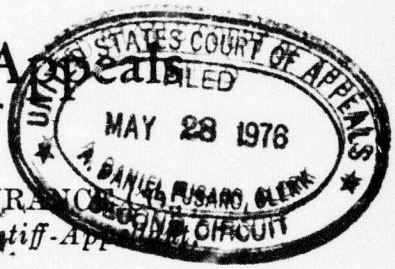
ORIGINAL

76-7158

To be argued by
RICHARD H. WEBBER

United States Court of Appeals

FOR THE SECOND CIRCUIT



THE EASTERN MARINE & FIRE INSURANCE [illegible],
Plaintiff-Appellant,

against

S.S. COLUMBIA, her engines, boilers, etc., ORIENTAL EXPORTERS, INC., and OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Defendants-Appellees,

OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Third-Party Plaintiff-Appellee,

against

JOHN PEMBERTON MOSSE, an Underwriter at Lloyd's, and INDEMNITY MARINE ASSURANCE CO., LTD.,
Third-Party Defendants-Appellants.

B P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

Statement of Issues Presented for Review

1. Is the burden to exercise due diligence to make a vessel seaworthy with respect to cargo satisfied merely by the vessel's owner retaining the services of independent marine surveyors to superintend repairs to the vessel

where the said marine surveyors are satisfied as to the adequacy of the completed repairs but where the evidence is that the repairs were, in fact, improper and inadequate?

2. Were the repairs made to the rudder of the S/S COLUMBIA in 1965 inadequate and improper, and, if so, were such repairs the cause of the rudder's failure in August, 1966?

Preliminary Statement

The Eastern Marine & Fire Insurance Co. (hereinafter Eastern), John Pemberton Mosse (hereinafter Mosse), and Indemnity Marine Assurance Co., Ltd. (hereinafter Indemnity) appeal from the finding of the District Court that they, as cargo underwriters, were obligated to contribute in a general average arising out of the loss of the S/S COLUMBIA's rudder on August 3, 1966. The opinion so finding was rendered by the Honorable Kevin T. Duffy on February 27, 1976.

Eastern sought to recover from the owner of the S/S COLUMBIA the sum of $120,000.00, which Eastern had deposited as security for the general average claim. In turn, shipowner sought recovery of $47,200.86 from Eastern, Mosse and Indemnity for the unpaid portion of the general average expenses.

Following trial, the Court below found that although the S/S COLUMBIA was unseaworthy in fact and in law when she sailed from her loading port due diligence had been exercised by shipowner to make the vessel seaworthy.

Proceedings Below

This suit was commenced in the name of Eastern, the leading cargo underwriter, against the owners and operators of the S/S COLUMBIA on December 3, 1968, seek-

ing recovery of the $120,000.00 general average deposit plus interest and costs. The shipowner counterclaimed against Eastern and commenced a third-party action against Mosse and Indemnity for the unpaid portion of the general average expenses. The matter proceeded to trial on September 16, 1974. The trial concluded on October 2, 1974. On February 27, 1976, an opinion, No. 43,966, was rendered finding in favor of defendants and third-party plaintiff (5a-11a).

The notice of appeal herein was filed March 26, 1976 (12a).

Facts

General Background

At about 4:35 p.m., on the afternoon of August 3, 1966, while in the Indian Ocean about five hundred miles east of Aden, the S/S COLUMBIA lost her rudder (T5, E129).* Salvage assistance was obtained and the COLUMBIA was first towed to Trincomalee, Sri Lanka, as a port of refuge, and thence to Singapore for repairs (T6, E189). In due course, the owner of the vessel declared a general average.

On the afternoon of August 3, 1966, the S/S COLUMBIA was in the open waters of the Indian Ocean and was encountering the southwest summer monsoon (8a). The uncontroverted testimony of Rear Admiral Richard O. Patterson, an experienced shipmaster, was that the summer monsoon is not an unusual event but, on the contrary, occurs every year and has done so for thousands of years (T89-90, 8a). The testimony of the master of the COLUMBIA was that on August 3, the seas were from twelve to twenty feet in height with fifteen to twenty foot swells, "some-

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* "T" refers to transcript page. The trial transcript is reproduced in full in the Joint Appendix. "E" refers to pages in the exhibit volume.

where in that neighborhood" (T66). The log of the COLUMBIA for the same date shows that wind strength had reached a maximum of Force 7 on the Beaufort scale at about noon, abating to Force 6-7 by the time of the rudder casualty (E129). It was not disputed that the sea state, swell height and winds were "quite normal" for the time of year and place (9a, T90-91).

In her original form, the S/S COLUMBIA was a war-built T-2 tanker completed at Portland, Oregon in 1945 (T5). In 1962 the ship had been converted to a bulk carrier by the insertion of a new mid-body at a shipyard in Skaramangas, Greece (7a, T5). At all material times, the COLUMBIA was registered under the laws of the United States of America and was entered in the classification society known as the American Bureau of Shipping (T6).

At the time of her rudder casualty, the COLUMBIA was loaded with approximately 20,000 metric tons of superphosphate fertilizer, which had been loaded at Safi, Morocco, during the period July 14-18, 1966 for carriage to the Republic of South Korea (T5, E1, 3). The Eastern Marine & Fire Insurance Company, John Pemberton Mosse and Indemnity Marine Insurance Co., Ltd., provided cargo insurance in respect of said shipment, which coverage included the obligations of the owners of the cargo to contribute to any proper general average (T5). Upon demand of the owner of the COLUMBIA, plaintiff posted $120,000.00 as general average security (6a). Additional general average contributions in the amount of $47,200.86, claimed to be due from cargo interests, have not been paid to the shipowner (6a).

There was no evidence of any grounding or striking of a submerged object or canal bank or the like which might explain the loss of the COLUMBIA's rudder. Neither the deck logs nor the engine logs contain any reference to an incident that might have been related to the loss (8a).

The Rudder of the S/S Columbia

The rudder of the S/S COLUMBIA was attached to the vessel's stern frame at two points, the upper and lower gudgeons, by the use of pintles (large steel pins threaded at one end) secured in position by nuts (E51, 54). The lower gudgeon was located at the after end of the skeg. To ensure that the lower pintle could not back out of its nut, "drop" and carry away from the vessel thereby leaving the rudder unsupported at its lower end, the original T-2 tanker design provided for the installation of a brass split pin (or cotter pin) through the head of the pintle just above the nut (E51, T208-212). To guard against the remote possibility of the split pin failing and the pintle "dropping", a "keeper plate" was attached to the underside of the skeg by twelve three-quarter inch brass hexagonal head tap bolts plus six inches of tack welding (E51). For some reason, the brass split pin was not reinstalled in the COLUMBIA's lower pintle upon completion of rudder repairs made at Jacksonville in 1965. Instead, a horseshoe-shaped "keeper bar" was fitted. This "keeper bar" was welded to the rudder frame at two points and to the pintle nut at two points (T139-140, E53). It was not, however, welded to the pintle proper and, as a result, the pintle remained free to turn in the nut without restraint.

Subsequent to the casualty, the COLUMBIA's rudder was found to have fractured at a point approximately two inches below the palm flange (the point of connection between the rudder and the rudder stock) (9a). The upper pintle was still in place, although the pintle nut was missing and the pintle threads damaged (9a). The lower pintle and pintle nut were missing, although the pintle bushing in the gudgeon apparently was in place (9a). The skeg was undamaged (9a). Virtually all of the twenty-two foot high rudder was missing.

Evidence and testimony offered on behalf of both shipowner and cargo interests supports the conclusion that the

carrying away of the lower pintle was the initiating cause of the rudder failure (T216-217, E199). In this circumstance, it is appropriate to set forth the history of the lower pintle for the three years prior to August 3, 1966.

The 1964 Drydocking at Norfolk

On October 4, 1963, the S/S COLUMBIA reportedly grounded at Kandla, India, sustaining damages to her rudder and lower skeg (T172-173, E16, 168, 181). These damages were repaired between March 25 and April 4, 1964, when the ship was drydocked at Norfolk, Virginia (E180-185). The marine surveyor attending the drydocking on behalf of the shipowner was James E. Sweeney, a partner in the firm of Pillatt & Sweeney Corporation (T168, 170). The extensive repairs required the unshipping of the rudder, its removal to the shipyard's machine shop for examination and repair and its subsequent reinstallation in the vessel (7a, E16-17). In the course of the latter operation, the pintles and pintle nuts were refitted. It is not disputed that the 1964 repairs to the COLUMBIA were apparently made to the satisfaction of the ship's master, Mr. Sweeney, as the shipowner's attending marine surveyor, and various other inspectors and surveyors (7a).

The 1965 Drydocking at Jacksonville

Notwithstanding the extensive repairs made to the rudder of the S/S COLUMBIA at Norfolk in 1964, Mr. Herman Berke at Pillatt & Sweeney Corporation, the surveyor attending the vessel on behalf of the owners at the 1965 drydocking, found that "the lower pintle pin had dropped approximately 1" due to nut backing off" (T117, 123, E20). The corrective measures taken are described in Jacksonville Shipyard's invoice for Job V-2494 as follows:

> Remove the lower pin and clean up taper. Place the pin in lathe and machine off the deteriorated threads. Clean up taper in gudgeon and reinstall pin and

> harden up on both nuts to the satisfaction of all interested parties. Install nut keepers on both nuts. Replace inspection plates as original and install flat-bar keeper on lower edge of skeg (E32).

It is not disputed that the 1965 rudder repairs were made to the satisfaction of the vessel's master, Mr. Berke, as the shipowner's attending marine surveyor, and the American Bureau of Shipping surveyor. What is disputed is whether or not the repairs were, "in fact", proper. Shipowner argues that they were. Appellants submit that the evidence and uncontroverted expert testimony firmly establish that they were not.

ARGUMENT

POINT I

Due diligence was not exercised merely by shipowner's retaining the services of independent marine surveyors to superintend repairs to the S/S Columbia in the face of uncontroverted evidence that the repairs were performed improperly.

The District Court held, as a matter of law, that the owner of the S/S COLUMBIA had exercised due diligence to make the vessel seaworthy prior to her sailing from Safi, Morocco, for South Korea on July 18, 1966 (10a) merely by appointing a surveyor to superintend vessel repairs and having the latter be satisfied as to the adequacy and propriety of the repairs. What findings of fact were made by the District Court in support of this legal conclusion? Simply these (10a-11a):

> When the rudder was first damaged in India in 1963, repairs were made fairly promptly under the supervision of independent marine surveyors, all of whom *apparently* passed favorably on the workmanship of the repairs and the ship was restored to the highest

> classification of the American Bureau of Ships. Subsequently, the COLUMBIA was again put in drydock and inspected. Keeper bars were installed over the pintle [nuts]. Again *independent marine surveyors and inspectors found the work to be satisfactory and the ship seaworthy.*
>
> • • •
>
> *What more could be done?* (Emphasis supplied).

The shipowner having assigned the marine surveyor the task of superintending the repairs to the rudder of the S/S COLUMBIA, the question properly is what more the surveyor could have done to insure the seaworthiness of the vessel. Insofar as the surveyor may have performed his task negligently or inefficiently, his negligence or inefficiency must be attributed to the shipowner, for the latter's obligation to exercise due diligence is not delegable. *The Colima*, 82 F. 665 (S.D.N.Y. 1897).

The Court below also pointed out that the master and chief engineer of the COLUMBIA visually inspected the rudder before the ship sailed from Safi (11a). However, the evidence was clear and uncontroverted that the lower portion of the rudder was then underwater and invisible and that, in any event, the lower pintle nut and locking device were hidden from view by inspection plates welded on to the rudder (T24-25, 63-64, 130-131). In these circumstances, a visual inspection could not have revealed any problems with the lower pintle, pintle nut and locking device. Of course, mere visual inspections always have been held to be insufficient to prove due diligence. *The Southwark*, 191 U.S. 1, 16 (1903). However, it is not contended by appellants that the inspection at Safi should have been more thorough or extensive. What is contended is that the repairs at Jacksonville in early 1965 were inadequate and improper and that the District Court erred in substituting for its own critical assessment of

the propriety and adequacy of the repairs, the findings of "independent marine surveyors and inspectors".

From the findings of fact quoted *supra*, which provided the basis for the District Court's conclusion of law and which did not include a finding that the 1965 repairs were in fact proper, it is apparent that the District Court held, as a matter of law, that the shipowner's duty to exercise due diligence to make the S/S COLUMBIA seaworthy was performed by entrusting supervision of the 1965 Jacksonville repairs to independent marine surveyors, so long as the latter found the repair work to be satisfactory and the ship seaworthy. It is equally apparent that the District Court did not determine for itself whether the repairs were "in fact" adequate and proper, feeling itself bound by the "findings" of the attending surveyors and inspectors. This was error.

The shipowner must affirmatively prove the exercise "in fact" of due diligence to make the carrying vessel seaworthy "in fact". *The Leerdam*, 17 F. 2d 586, 587 (5th Cir. 1927). As was said in *Artemis Maritime Co., Inc.* v. *Southwestern Sugar & Molasses Co., Inc.*, 189 F. 2d 488, 491 (4th Cir. 1951), that burden upon the shipowner can be satisfied only:

> . . . by producing clear proof that the loss and damage did *not* result from failure to exercise due diligence to make the vessel seaworthy in fact, and that it *did* result from a peril of the sea.

The Court of Appeals went on to say:

> This heavy burden is not carried if the issue is left in doubt.

The obligation to exercise due diligence is personal to the shipowner, *Southern Pacific Co.* v. *United States*, 72 F. 2d 212, 215 (2nd Cir. 1934), and cannot be satisfied merely by delegating that duty to a third party, *Huilever*

S.A. v. *The Otho,* 49 F. Supp. 945 (S.D.N.Y. 1943), *aff'd,* 139 F. 2d 748 (2nd Cir. 1944). This point has been well established by a long line of American, British and Canadian cases beginning with *The Colima, supra,* and continuing through *Riverstone Meat Co.* v. *Lancashire Shipping Co.,* [1961] 1 Lloyd's List L.R. 57 (H.L. 1960). See also *Canadian Transport Co., Ltd.* v. *Hunt, Leuchars, Hepburn, Ltd.,* [1947] 2 D.L.R. 647 (Ex. Ct. of Canada, B.C. Adm. Dist. 1947) and *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp.,* 112 F. Supp. 630 (S.D.N.Y. 1953). The applicable rule of law and the reasons therefore were perhaps most accurately and succinctly stated in *The Colima, supra* at 678, a decision cited with approval by the House of Lords in *Riverstone Meat Co.* v. *Lancashire Shipping Co., supra* at 68-69:

> This section [46 U.S.C. § 192] has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The act requires in other words, due diligence in the work itself. . . . On any other construction, owners would escape all responsibility for the seaworthiness of their ships merely by employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. On reason and sound policy no such intent in the statute can be supposed. . . .[The warranty of diligence] requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal.

Inasmuch as the owner of the S/S COLUMBIA was obliged to affirmatively prove the exercise "in fact" of due diligence to make the ship seaworthy "in fact", *The Leerdam, supra,* and *Internatl. Produce, Inc.* v. *Frances Salman, Etc.,* 1975 A.M.C. 1521, 1541 (S.D.N.Y. 1975), it nec-

essarily follows that due diligence is not shown merely by an independent marine surveyor's satisfaction with the repairs performed under his supervision. *Canadian Transport Co., Ltd.* v. *Hunt, Leuchars, Hepburn, Ltd., supra,* is squarely on point, even to the extent of dealing with cargo's obligation to contribute in general average.

In the *Canadian Transport* case, the Schooner CITY OF ALBERNI had undergone hull repair at both Vancouver and San Francisco. The repair in Vancover was attended by one Captain Clarke of the San Francisco Board of Marine Underwriters, who stated under examination that: "I considered it a very satisfactory repair." Likewise, after the repair at San Francisco, one Edward Hough, acting on behalf of the classification society known as Bureau Veritas, issued a certificate stating in relevant part:

> As the vessel was diverted from her voyage she entered San Francisco Bay where repairs were effected and the vessel is now on this date, in my opinion, in fit seaworthy condition to carry lumber cargoes on trans-ocean voyages.

Nevertheless, the Court, having considered *all* the facts of the case, concluded that due diligence had not been exercised to make the CITY OF ALBERNI seaworthy, notwithstanding the satisfaction of the attending surveyor and the classification society with the quality of the repair work. The Court noted in passing that:

> The carrier's obligation under the Water Carriage of Goods Act, 1936, to exercise due diligence to see that his ship is seaworthy, is not limited to his personal diligence and so does not confer upon him as great a benefit as would at first appear; for his responsibility extends to the acts or defaults of his agents or servants.*

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* The Canadian Water Carriage of Goods Act, 1936, is substantially similar to the United States Carriage of Goods by Sea Act, 1936, in respects relevant and material to the instant case.

A rule of law to the contrary would substitute the opinion of the attending surveyor, whose services were retained and paid for by the shipowner, for the findings of the trier of fact. As a practical matter such a rule of law would undermine the holdings of *The Colima, supra,* and like cases to the point of their being meaningless, for rarely, if ever, will a marine surveyor admit to having knowingly or willingly permitted improper and inadequate repairs to be made to a seagoing vessel. In other words, it was the obligation of the District Court in the instant case to determine for itself whether the attending surveyors and inspectors were correct in approving the 1965 repairs to the rudder of the S/S COLUMBIA. The subjective standard of the honest though mistaken belief of the surveyors that the repairs may have been proper may suffice to relieve a surveyor's conscience of moral blame but it does not relieve the shipowner's pocketbook of liability for the resulting damage. See *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp., supra* at 637.

It is to be anticipated the shipowner will argue that the rudder repairs were also approved by the United States Coast Guard. Such an argument does not accord with the evidence. Captain William E. Heath, the Coast Guard officer who inspected the COLUMBIA in 1965, testified that if he had observed "anything requiring attention" in respect of the COLUMBIA's rudder he would have so noted in his Dry Dock Examination Book so that he could return to verify the satisfactory completion of required repairs (E 79-80). There was no such notation in the Examination Book filled out by Captain Heath (E 79-80). Moreover, Captain Heath stated that he had *no* knowledge of any repairs to the rudder of the COLUMBIA in the course of the 1965 Jacksonville drydocking (E 81-82). It seems fair to suggest that if Captain Heath had no knowledge of any repairs he could not have verified their propriety.

Nor could the fact that the repairs were nominally approved by the American Bureau of Shipping surveyor attending the 1965 drydocking be binding upon the District

Court as a matter of law.* Shipowners have frequently resorted to the plea that, having engaged classification society surveyors, they are free to rely upon the reports and conclusions of the latter as sacrosanct vis-a-vis cargo interests. The United States courts have regularly rejected such arguments. The United States Court of Appeals in *Bank Line* v. *Porter,* 25 F.2d 843, 845 (4th Cir. 1928), *cert. den.,* 278 U.S. 623 (1928) accurately expressed the applicable law when it said:

> It is contended, on the part of the respondent that the certificate of seaworthiness issued by Lloyd's surveyor at Calcutta was sufficient to absolve the owner from any neglect with regard to the condition of the Poleric. We cannot agree with this contention. . . .

With further regard to the limited value of certificates issued by a classification society, see also *Blanchard Lumber Co.* v. *S/S Anthony II,* 259 F. Supp. 857 (S.D.N.Y. 1966). Perhaps the best example of the proper value to be attributed to such certificates is to be found in *Navegacion Castro Riva* v. *The M. S. Nordholm,* 178 F. Supp. 736, 741 (E.D. La. 1959), *aff'd,* 287 F. 2d 398 (5th Cir. 1961), in which the District Court stated:

> The classification society's opinion as to the seaworthiness of a vessel does not resolve the question. It has been this Court's experience that classification societies often continue vessels in class long after their highest and best use would be as scrap.

In August, 1966, the S/S COLUMBIA was twenty-one years old.

Of course, the mere fact that the District Court relied upon the opinions of the surveyors and inspectors in lieu of making its own findings as to the propriety and adequacy of the 1965 repairs to the rudder of the S/S

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* The surveyor himself was not called to testify by shipowner and only the survey report itself was in evidence.

COLUMBIA would not constitute grounds for reversal in the absence of substantial evidence that the repairs were, in fact, inadequate and improper. There was such evidence and, it is submitted, the existence of such evidence, substantially all of which remains uncontroverted, mandates a reversal of the decision below.

POINT II

The Court of Appeals is not bound by the "unless clearly erroneous" rule in determining whether the correct legal standard was applied by the Court below.

It is to be anticipated that counsel for appellee shipowner will argue that the District Court did determine, as a fact, that the repairs to the rudder of the S/S COLUMBIA met the "due diligence" standard and, accordingly, that the District Court's determination cannot be set aside absent a finding by the Court of Appeals that the lower court's determination was "clearly erroneous". Although appellant cargo interests do maintain that the District Court's determination actually was clearly erroneous, they likewise submit that the "unless clearly erroneous" rule is not applicable here.

In effect, a finding of lack of due diligence in respect of repairs to a vessel is at least a finding that the repairs were made negligently. Appellants have no quarrel with the facts found by the District Court and stated as such in its opinion. However, these facts cannot support a finding that due diligence was exercised to make the rudder of the S/S COLUMBIA seaworthy or, conversely, that the repairs to the COLUMBIA's rudder were not negligently carried out.

The fundamental question in this case is whether the correct legal standard was applied to the facts found by the trial court. If uniformity within a circuit or among circuits is to be achieved, it is necessary that appellate review of the application of a legal standard be free of

the shackles of the "unless clearly erroneous" rule. *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F. 2d 774, 776-777 (2nd Cir. 1966). Accordingly, it is submitted that this Court may determine for itself whether the evidentiary facts support a finding of due diligence without extending to the determination of the District Court the benefit of the "unless clearly erroneous" rule.

POINT III

The repairs to the rudder of the S/S Columbia at the 1965 drydocking were inadequate and improper

The evidence introduced at trial, both by shipowner and by cargo interests, was more than sufficient to establish with a high degree of certainty the proximate cause of the loss of the COLUMBIA's rudder, even though the rudder itself and the lower pintle and pintle nut were at the bottom of the Indian Ocean. The independent marine surveyor acting on behalf of the vessel's hull underwriters who inspected the COLUMBIA at Singapore was of the opinion that the lower pintle could have carried away during the rough seas met by the ship on August 3, 1966, causing the rudder to fracture (E199). This opinion was not and is not dispositive of the issue of causation for it skirts the underlying question of exactly what caused the pintle to carry away.

Mr. Edward Ganly, the naval architect and marine surveyor who testified on behalf of cargo interests, agreed that the loss of the rudder was in consequence of the lower pintle carrying away. However, Mr. Ganly went on to state that, in his opinion, the lower pintle carried away because of inadequate and improper repairs at the 1965 Jacksonville drydocking (T217, 248-249).

Moreover, the District Court quite properly disregarded shipowner's argument that heavy weather amounting to a peril of the sea was the proximate cause of the rudder fail-

ure. There was uncontroverted testimony that the weather conditions encountered by the S/S COLUMBIA were neither unusual nor severe. On the date of the casualty, the COLUMBIA was in the midst of the southwest monsoon, a phenomenon known to and anticipated by mariners for thousands of years. Even so, the wind was only Force 6-7 on the Beaufort scale and though the seas were moderately rough the courts have consistently rejected arguments made on behalf of shipowners that such conditions amount to a peril of the seas for a well-found ocean-going vessel. See for example *City of Khios,* 16 F. Supp. 923 (S.D.N.Y. 1936); *The Shickshinny,* 45 F. Supp. 813 (S.D. Ga. 1942); *The Governor Powers,* 243 F. 961 (D. Mass. 1917); *Norris Grain Co.* v. *Great Lakes Transit Corporation,* 70 F. 2d 32 (7th Cir. 1934). The heavy weather defense was obviously rejected for another very good reason: It was Mr. Ganly's uncontroverted testimony that heavy weather rudder failures on T-2 type vessels leave in their aftermath associated damages of a nature not observed by the surveyor at Singapore (T207, 216, 240).

Of course, if heavy weather was not the cause, and no serious argument can be made to the contrary, the only question which could remain is whether the failure was in consequence of a latent defect in the vessel not discoverable by the exercise of due diligence or in consequence of an obvious defect which could and should have been detected and corrected in the exercise of due diligence. There was no evidence offered by shipowner to establish the existence of a latent defect. Indeed, the very fact that the pintle had commenced to back out of the nut between the 1964 and 1965 drydockings establishes that the defect was not latent but was inherent in the type of repairs being made to the COLUMBIA. On the other hand, it is submitted evidence offered by both shipowner and cargo interests established, beyond the peradventure of a doubt, the fact that the rudder casualty sustained by the S/S COLUMBIA was the direct,

logical and inevitable consequence of the installation of an improper and inadequate locking device on the lower pintle nut at the 1965 drydocking.

Perhaps if cargo interests could point only to the 1966 rudder failure itself, one could argue properly that Mr. Ganly's testimony as to causation, discussed *infra*, at pages 20-21 was speculative and not entitled to great weight. This, however, was most emphatically not the case.

By way of example, when the S/S COLUMBIA was drydocked at Jacksonville in 1965, the shipowner's attending surveyor, Mr. Berke, found that the lower rudder pintle ". . . had dropped approximately 1" *due to nut backing off.*" (Emphasis supplied) (E20). Inasmuch as there were four threads to the inch on the head of the pintle, it is apparent that the pintle had backed away approximately four turns (E51). For the foregoing to have taken place, the locking device installed at the 1964 drydocking must have either failed or have been insufficient to perform its intended function. Indeed, if the pintle and pintle nut had not been inspected at the 1965 drydocking and the above-described condition found, the inevitable result would have been that the pintle would have continued to drop until it carried away completely, causing a rudder failure identical with that later sustained by the COLUMBIA on August 3, 1966.

What then was Mr. Berke's reaction upon finding this potentially dangerous condition? He concededly did not conduct a searching investigation into what had caused the condition to arise, as the exercise of due diligence would have required. *Standard Oil Co.* v. *Anglo-Mexican Petroleum, supra; Erie & St. Lawrence Corporation* v. *Barnes-Ames Co.*, 52 F. 2d 217, 219 (W.D.N.Y. 1931). Indeed, Mr. Berke did not even ascertain what type of locking device had been installed at the 1964 drydocking of the COLUMBIA at Norfolk, even though the surveyor

attending the latter drydocking on behalf of owner was one of Mr. Berke's partners. If Mr. Berke did not know what kind of locking device had been installed in 1964, and had thereafter proven itself to be insufficient or ineffective, it is impossible to comprehend how due diligence could have been exercised in installing the new locking device in 1965, for the latter may well have been no more than a repetition of the demonstrably inadequate 1964 "repair".

In any event, it must be obvious to even the untutored layman that the lower pintle and pintle nut of the S/S COLUMBIA, subject as they were to the vibration and pounding of a vessel at sea, had to be prevented from separating in the event the pintle began to work within the nut. It should be equally obvious that the horseshoe-shaped keeper bar, installed over the pintle nut at the behest of Mr. Berke, did no more than lock the pintle nut to the rudder frame (T139-140, 213-214, 232-234, E53). It utterly failed to prevent the pintle from backing out of the nut because the movement of the pintle was not restrained in any effective manner. The brass split pin, called for in the vessel's original design, would have prevented the pintle from backing off the nut as would have a horseshoe-shaped keeper bar welded to the rudder frame, the pintle nut *and* the pintle proper, albeit in a much less reliable and satisfactory manner than a split pin. Mr. Sweeney, Mr. Berke's former partner, stated that while he did not think locking devices were "required" (presumably by the classification societies) such devices were installed as a matter of ". . . prudence, good operation and good procedure" (T254). Conversely, it is submitted an inadequate and improper locking device is imprudent and indicative of poor operation and procedure.

In his opinion, the District Judge propounded the rhetorical question, "What more could be done?" The answer is, "Quite a lot."

In the first place, the owners of the S/S COLUMBIA could have brought her rudder appurtenances back into compliance with the original design in the course of the 1965 drydocking. The design drawing of the T-2 tanker contraguide rudder shows (1) that the rudder pintle nuts are to be prevented from backing off the pintles by the use of a brass "split pin", more commonly known as a cotter pin, and (2) that the lower pintle is to be prevented from "dropping" by securing a "keeper plate" to the underside of the lower skeg by six inches of tack welding and twelve three-quarter inch hexagonal head tap bolts (E51). It is not disputed that the S/S COLUMBIA left Jacksonville after her 1965 drydocking with (1) a horseshoe-shaped steel keeper bar in lieu of the original brass split pin and (2) a flat keeper bar tack welded to the underside of the skeg in lieu of the original keeper plate secured by both tack welding and twelve tap bolts. The question then arises as to whether the departures from the original T-2 tanker design approved by Mr. Berke resulted in a rudder assembly at least as strong and functional as the original. It is submitted that the answer must be in the negative.

It was the undisputed testimony of Mr. Ganly that the brass split pin was superior to a horseshoe-shaped steel keeper bar for at least two reasons (T212-213, 232). First, the split pin, being made of brass, is not subject to salt-water corrosion; a steel bar is. Second, by its very design and method of installation, the split pin is not affected by rudder shock and vibration as is a keeper bar. On this latter point, Mr. Ganly's expert testimony was, in fact, confirmed in large part by the testimony of Mr. Joseph Salzarulo, an expert witness called by shipowner, who testified (T153-154):

> *Vibration could cause the tack welds to fail on the keepers* and the nut to back off maybe one turn, two turns, whatever the case may be. (Emphasis supplied.)

It is worthy of note that the threads on the lower pintle were four to the inch. The pintle was found to have dropped approximately one inch by the time of the 1965 drydocking.

With respect to the propriety of a flat keeper bar tack welded to the underside of the skeg, as opposed to the original keeper plate secured by both tack welding and tap bolts, Mr. Ganly's testimony, to the effect that the "keeper plate" was stronger and less susceptible to corrosion, was again uncontroverted (T214-215). Mr. Ganly's testimony on this latter point is reinforced by the fact that the previous keeper bar on the underside of the skeg must have come adrift prior to the 1965 drydocking in order for the pintle to have dropped one inch, there ordinarily being but ¼ inch clearance between the bottom of the pintle and the keeper on the underside of the skeg (E51).

At the very least, the exercise of due diligence would have required that the horseshoe-shaped keeper bar welded to the pintle nut and rudder frame also be welded to the head of the pintle, thereby preventing the pintle from turning in the nut. But even this *minimal* precaution was not undertaken.

Mr. Ganly's explanation of the series of events which climaxed in the failure of the COLUMBIA's rudder was unrebutted and uncontroverted (T 216-217). Mr. Ganly noted first that the lower pintle, not being restrained by any effective locking device, was able to turn in the pintle nut (as it had in the interval between the 1964 and 1965 drydockings). If the keeper bar on the underside of the skeg was still in place when the pintle had "dropped" far enough to contact the bar, the weight of the pintle (a piece of steel some 29 inches long and 10 inches in extreme diameter) and rudder shock transmitted to the bar through the pintle would cause the bar on the underside of the skeg, secured only by some tack welding, to fail, thereby per-

mitting the pintle to carry away from the ship once it had completely backed out of the lower pintle nut. As Mr. Ganly pointed out, the keeper bar tack welded to the underside of the skeg was, unlike the original keeper plate for which it was substituted, susceptible to corrosion and fatigue fracture. Thus, it is quite possible that the keeper bar on the underside of the skeg had failed even before the pintle began to "drop".

Once the lower pintle had carried away, the rudder proper was supported only at the upper pintle and the rudder palm. The area of maximum stress on the rudder was then directly below the palm where the fracture actually took place (T 216). Mr. Emmanuel Silkiss, the highly qualified metallurgist called by the shipowner as an expert witness, testified that the rudder fracture did not result from metal fatigue but, rather, was in the nature of an impact fracture resulting from a relatively limited number of blows (T 192). Upon cross-examination, Mr. Silkiss candidly stated that the fracture could have been caused by waves working against a rudder which was not restrained at its bottom and was, thus, free to swing about a fulcrum at the top of the rudder (T 194).

Mr. Ganly's explanation is no mere speculation. It is consistent with each and every piece of surviving physical evidence (all of which was considered by Mr. Ganly in forming his opinion (T 204-206) and, in fact, is no more than a restatement of that chain of events which took place between the 1964 and 1965 drydockings as carried to their logical and inevitable conclusion.

The obvious consequences of the loss of the vessel's rudder being so great, the least degree of care that should have been demanded was that the rudder be capable of withstanding all but the most unexpected and catastrophic weather. Such care the owner of the S/S COLUMBIA did not bestow in fitting the vessel for sea as the events of

August 3, 1966 proved. Where the dangers are great, the standard of care must be accordingly high. *Edmond Weil, Inc.* v. *The American West African Line, Inc.*, 147 F. 2d 363, 365-366 (2d Cir. 1945).

As a practical matter, it is virtually impossible for a shipowner to prove the exercise of due diligence absent his coming forward with an explanation of the casualty sustained by the vessel, particularly where the vessel has had a history of similar problems. In *The Heddernheim*, 39 F.Supp. 558 (S.D.N.Y. 1941) the District Court stated as follows, at 564:

> The shipowner has no adequate explanation for the breakdown of the boilers, and the theories advanced by the owner are either refuted by the facts adduced, or by their own witnesses who testified that all the explanations offered were just theories—"one just as good as the other."
>
> The mere fact that the usual inspection was made of the boilers and condensers before sailing . . . is not due diligence when it was known to the owners that the condenser tubes were constantly breaking down prior thereto . . . .

The Heddernheim was similar to the instant case in that there was no direct evidence to explain the collapse of the ship's boilers, no intervening circumstances shown, no real peril of the sea claimed nor any claim that the collapse was in consequence of a prior stranding. There too, cargo interests produced, as an expert witness, a consulting engineer and marine surveyor of many year's experience who advanced at least two theories as to the cause of the boiler collapse which the Court found "plausible" and "very probable" respectively. In *The Heddernheim, supra*, the Court, nevertheless, found that the actual cause of the boiler collapse had to be left to conjecture as none of the inspections

made after the casualty definitely established the cause. However, *in light of the ship's prior history,* the Court held that the boiler collapse would not have occurred had proper care been taken of the boilers and due diligence used. It is here submitted by cargo interests that the failure of the COLUMBIA's rudder likewise could not have occurred had proper care been taken and due diligence exercised.

In the circumstances, a finding that due diligence was exercised in respect of the repairs made to the rudder of the S/S COLMUBIA at Jacksonville in 1965 would be clearly erroneous, particularly in view of the District Court's finding that the COLUMBIA was unseaworthy ". . . in fact and in law . . ." at the time of her sailing from Safi, Morocco, on July 18, 1966. There being no evidence of any repairs to the COLUMBIA's rudder at Safi or, indeed, at any time between the 1965 drydocking and the time of sailing from Safi and there being no evidence of any intervening cause to account for the loss of the rudder, it necessarily follows that the unseaworthiness of the S/S COLUMBIA dated from the completion of the 1965 drydocking and associated improper and inadequate rudder repairs.

CONCLUSION

The decision of the Trial Court should be reversed on the ground that due diligence to make the S/S Columbia seaworthy in fact was not exercised in fact by the owner of the vessel.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 28TH day of MAY 1976.

Burlingham Underwood & Lord/Jaffe

Attorneys for DEFENDANTS-APPELLEES
AND THIRD PARTY PLAINTIFF-APPELLEE